

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Fones4All Corp.)	
)	
Petition for Expedited Forbearance)	
Under 47 U.S.C. § 160(c) and Section 1.53)	WC Docket No. 05-261
from Application of Rule 51.319(d))	
To Competitive Local Exchange)	
Carriers Using Unbundled Local Switching)	
to Provide Single Line Residential)	
Service to End Users Eligible for State)	
or Federal Lifeline Service)	

REPLY COMMENTS OF FONES4ALL CORPORATION

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REPLY COMMENTS OF FONES4ALL CORPORATION

Fones4All Corporation (“Fones4All” or the “Company”), by its attorneys, hereby submits these Reply Comments in support of its Expedited Petition for Forbearance (“Petition” or “Fones4All Petition”) filed with the Federal Communications Commission (the “Commission”) in the above-captioned proceeding. Fones4All has demonstrated that the forbearance criteria have clearly been met and for the reasons discussed herein, the Commission is compelled to expeditiously exercise its forbearance authority under Section 10 of the Communications Act of 1934, as amended (the “Act”),¹ 47 U.S.C. § 160, and to forbear from further application of Section 51.319(d) of the Commission’s rules, as modified in the *Triennial Review Remand Order*.²

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

² See *In the Matter of Unbundled Access to Network Elements* (WC Docket No. 04-313); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (CC Docket No. 01-338), Order on Remand, FCC 04-290 (rel. Feb. 4, 2005) (“*Triennial Review Remand Order*” or “*TRRO*”).

I. INTRODUCTION AND SUMMARY

The Fones4All Petition, like the recently granted forbearance petition of TracFone Wireless, Inc.,³ requires the Commission to “examine the statutory goals of universal service in section 254 specifically in the context of ‘low income consumers.’”⁴ In the *TracFone Petition*, the Commission recognized that promotion of competition among providers of telecommunications services to the low income consumers referenced in Section 254(b)(3) of the Act is a significant consideration in evaluating whether forbearance is warranted in the context of petitions that seek to expand universal service availability to low income consumers.⁵ The Commission noted that while all three prongs of the test for forbearance under section 10 must be satisfied, the Commission “must consider whether forbearance...will promote competitive market conditions. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.”⁶ The record clearly indicates that the Fones4All Petition meets the standards for forbearance.

Since its inception, Fones4All has been dedicated to providing high quality services to low income consumers, unlike most other carriers, for whom the low income market is one to be avoided. Many of Fones4All’s customers previously have never had telephone service. Today Fones4All is in the marketplace providing a competitive alternative for basic wireline telephone

³ See TracFone Wireless, Inc. Petition for Forbearance, CC Docket 96-45, filed June 8, 2004 (“*TracFone Petition*”).

⁴ See Order, *In the Matter of Federal State Joint Board on Universal Service and Petition of TracFone Wireless, Inc. for Forbearance From 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i)*, CC Docket 96-45, FCC 05-165, ¶ 9 (Sept. 8, 2005) (“*TracFone Order*” attached hereto as **Attachment A**).

⁵ *Id.*, ¶ 8. See also, 47 U.S.C. § 160(b) (noting that the public interest is satisfied if granting a petition will enhance competition).

⁶ *Id.* (notes omitted).

service to approximately 75,000 Lifeline eligible consumers, over 90% of whom who were identified by Fones4All using the innovative methods recommended by the Federal State Joint Board on Universal Service, such as multi-media campaigns using print, TV and radio advertising, advertisements on public transit, and door-to-door canvassing.⁷ In addition to the low income customers who are reached through Fones4All's extensive outreach programs, tens of thousands of customers have learned of the availability of Fones4All service through word of mouth from family members and neighbors, a sign of the high quality of service Fones4All provides. With the March 11, 2006 deadline looming for full implementation of Rule 51.319(d) and the cut-off of the availability of local switching ("ULS"), however, tens of thousands of Fones4All's customers who reside outside the geographic area where Fones4All is attempting to deploy facilities face the significant risk losing their Fones4All service, as do Lifeline customers of other carriers who utilize ULS in their networks.

Predictably, the only parties to oppose the Petition were three of the four Regional Bell Operating Companies ("RBOCs") and the trade association that represents them, USTelecom ("USTA").⁸ In the same way that these same parties attacked the *TracFone Petition*, the RBOCs and USTA attempt to frame the debate in the instant proceeding as one of "facilities-based" versus "non-facilities based" carriers. In addition, they resort to a discussion of whether "unbundling" should be required. But the opponents miss the point entirely. Fones4All's

⁷ See Petition, 3.

⁸ See BellSouth's Opposition ("*BellSouth Opposition*"); Opposition of Verizon to Petition for Expedited Forbearance ("*Verizon Opposition*"); *Opposition of SBC Communications Inc. ("SBC Opposition")* and *Comments of the United States Telecom Association ("USTA Opposition")*; many competitors who currently utilize ULS reported to Fones4All that they would have filed comments in support of the Petition, but were barred from doing so by the "gag clauses" contained in the commercial ULS replacement agreements they signed with the RBOCs, which prohibit the CLEC from participating in any proceeding where the availability of ULS is an issue.

Lifeline customers do not care who owns the loop, switching and transport facilities over which they receive their service; they only know that they are receiving high quality telecommunications service with an extraordinary level of customer care from a carrier they have *chosen*. Moreover, as the Commission recognized in the *TracFone Order*, Section 254(b) does not express a preference for *which* facilities low income consumer are provided access to telecommunications and information. If there were any question in that regard, the Commission conclusively resolved it in the *TracFone Order*, where it held that the public interest would be served by forbearance from the requirement of Section 214(e) that ETCs provide service using their own facilities, and allowing a wireless reseller to receive Lifeline support. The Commission has an opportunity to further enhance the competition available to low income consumers eligible for Lifeline support consistent with its decision in *TracFone* by exercising its forbearance authority here, consistent with Section 10 of the Act.

II. THE STANDARDS FOR FORBEARANCE ARE UNQUESTIONABLY SATISFIED AND THE COMMISSION SHOULD EXPEDITIOUSLY FORBEAR FROM APPLYING RULE 51.319(d) TO CARRIERS USING ULS TO SERVE SINGLE LINE LIFELINE ELIGIBLE CUSTOMERS

As required by Section 10 of the Act, Fones4All has demonstrated in this proceeding that that Section 51.319(d) of Commission's rules, as applied to carriers providing Lifeline service to low-income customers, is not necessary to prevent unjust or unreasonable discriminatory treatment of telecommunications carriers, nor to protect the interests of telecommunications consumers, and further, that forbearance is in the public interest. Nothing in the opposing comments provides any reasoned justification for denying Fones4All's petition for forbearance from the requirements of Section 51.319(d) of the Commission's rules. In its Petition, Fones4All

addressed each component of the standard for forbearance codified at Section 10(a) of the Act,⁹ and therefore Fones4All will not reiterate its demonstration of compliance with each of those requirements.

Accordingly, it is clear that each of the criteria for forbearance has conclusively been met, and therefore the Commission should grant Fones4All's petition on an expedited basis. To avoid service disruption to low income customers, the Commission should grant Fones4All's Petition prior to March 11, 2006, the date on which Rule 51.319(d) is slated for full implementation. Moreover, aside from the fact that the forbearance criteria are met, the Commission is compelled to grant the Petition for a far simpler reason: Fones4All and other similar carriers, offer wireline service to low income consumers and promote the availability of the Lifeline program, thereby allowing citizens who did not previously have phone service to be provided with one of society's most basic tools to seek work, contact schools and employers and even to have basic dial-up Internet access. These significant benefits should be made available to all Americans regardless of the technology used to provide them. As the Commission recognized this past August when it launched the "Lifeline Across America" program, the fact that two-thirds of eligible participants are not enrolled in the Lifeline program compels the Commission to act to ensure that "everyone eligible is aware" of it.¹⁰

As the Commission has repeatedly held in applying its forbearance authority, "[t]he goal of the Telecommunications Act of 1996 is to establish a pro-competitive, deregulatory national

⁹ Fones4All Petition, 12-15.

¹⁰ See News, "FCC and NARUC Launch "Lifeline Across American" To Raise Awareness of Lifeline and Link-Up Programs," (July 26, 2005). The program includes a best practices working group, as well as joint outreach materials in English and Spanish, such as those currently used by Fones4All.

policy framework.”¹¹ An integral part of this framework is the requirement in section 10 that the Commission forbear from any statutory provision or regulation if it determines that: (1) enforcement of the regulation is not necessary to ensure that charges are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance is consistent with the public interest. Section 10 further provides that, in determining whether forbearance is in the public interest, the Commission “shall consider whether forbearance . . . will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”¹²

The Commission recently addressed its forbearance criteria in the context of a petition very similar to the instant Petition. In the *TracFone Order* the Commission, in evaluating a petition for forbearance from the “facilities” requirement of Section 214(e), concluded that it “must consider whether forbearance . . . will promote competitive market conditions. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.”¹³ As Commissioner Abernathy noted in her statement in the *TracFone Order*: “it is essential that [the Commission] take all possible steps to ensure that low income consumers are not barred from using available support on the basis of the specific technologies they wish to use or the specific business plans pursued by their service providers.”¹⁴

¹¹ Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).

¹² 47 U.S.C. §160(a).

¹³ *Id.* (notes omitted).

¹⁴ See Statement of Commissioner Kathleen Q. Abernathy, *TracFone Order In the Matter of Federal State Joint Board on Universal Service and Petition of TracFone Wireless, Inc. for*

Applying the same reasoning here, the Commission is compelled to forbear from applying section 51.319(d) of its rules in instances where a CLEC requests ULS for the sole purpose of providing, under a state or federal Lifeline program, service to a single line residential end user. Application of Rule 51.319(d) to carriers seeking to provide single line residential service to universal service eligible customers is contrary to the public interest, as it effectively eliminates wireline competition in the low income Lifeline eligible market, resulting in an outcome counter to the universal service goals established by Congress and the FCC.

As the Commission noted in the *TracFone Order*, “[u]niversal service has been a fundamental goal of federal telecommunications regulation since the passage of the Communications Act of 1934. Congress renewed its concern for low-income consumers in the Telecommunications Act of 1996 when it established the principles that guide the advancement and preservation of universal service. Specifically, the Act directs the Commission to consider whether “consumers in all regions of the Nation, *including low-income consumers* and those in rural, insular, and high cost areas, ... have access to telecommunications [services] ... at rates that are reasonably comparable to rates charged ... in urban areas.”¹⁵ Furthermore, as the Commission has noted on numerous occasions, and most recently in the *TracFone Order*, only one third of households eligible to do so participate in the Lifeline program.¹⁶ At the same time, telephone subscribership in the U.S. is trending downward, even when a shift to wireless telephones is taken into account.¹⁷ Forbearance from application of Rule 51.319(d) to carriers

Forbearance From 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R § 54.201(i), Order, CC Docket 96-45, FCC 05-165 (Sept. 8, 2005) (emphasis added).

¹⁵ See *TracFone Order*, ¶ 10 (emphasis provided).

¹⁶ *Id.*

¹⁷ See *Telephone Subscribership In The United States (Data through March 2004)* (released Aug. 2004); *Telephone Subscribership In The United States (Data through March 2005)*

who seek to serve single line residential Lifeline eligible end users will enable low income universal service eligible end users to continue to enjoy the fruits of a competitive market, and therefore will serve the public interest.

Section 10(b) of the Act specifies that promotion of competition is one of the hallmarks of the public interest analysis, and in making the public interest determination in its forbearance analysis, “the Commission must consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.”¹⁸

The Commission has recognized that providing telephone service to low-income universal service eligible consumers provides a benefit. As the Commission staff noted in its Lifeline Staff Analysis: “There is a benefit to increasing the number of Lifeline participants, and also a cost. The obvious benefit would be that some of those added Lifeline subscribers would newly receive telephone service. The cost at the federal level would be the additional federal dollars spent on the additional Lifeline enrollees.”¹⁹ By granting the Petition the Commission will be taking one more important step in increasing Lifeline enrollment in fulfillment of its

(released May 2005), both available at <http://www.fcc.gov/wcb/iatd/stats.html>. (“*Telephone Subscribership In The United States*”).

¹⁸ See Memorandum Opinion and Order, *Numbering Resource Optimization Petition for Forbearance From Further Increases in the Numbering Utilization Threshold*, 18 FCC Rcd 13311 ¶ 2 (2003).

¹⁹ See Report and Order and Further Notice of Proposed Rulemaking, *Lifeline and Link-Up*, WC Docket 03-109, FCC 04-87, Appendix K (2004) (“*April 2004 Universal Service Order*”).

universal service obligations under the Act and the policy goals outlined by Congress and the Commission.

III. THE CRITICISMS OF THE PETITION ARE BASELESS AND DO NOT WARRANT DENIAL OF THE FONES4ALL PETITION

The RBOCs ignore the competitive benefits that would flow from the grant of the Petition, and instead resort to baseless attacks regarding purported limits on the Commission's authority to grant the petition under Section 10. These attacks must be rejected out of hand. As an initial matter, the opponents of the Petition argue that it fails to satisfy the statutory requirements for exercise of the Commission's forbearance authority under Section 10 of the Act because grant of the Petition would impose additional regulations ILECs. BellSouth, SBC, Verizon and USTA all argue that the Petition is an "improper use of the forbearance tool"²⁰ that it would impermissibly impose unbundling obligations upon ILECs in a manner inconsistent with the "deregulatory goals of the Act."²¹ They argue that "forbearance is an eraser, not a pencil."²² However, these assertions are both incorrect and unsupported, as none of the cases cited by the opponents supports this proposition. The criteria for Section 10 forbearance are met by the Petition, notwithstanding the RBOCs' attempts to twist the actual forbearance standard into one supporting their flimsy arguments. As discussed below, the arguments posited by the RBOCs find no support in either the plain language of Section 10, or in the precedent cited. To the contrary, Fones4All's request for forbearance relief is entirely consistent with any reasonable application of Section 10.

²⁰ *SBC Opposition* at 2.

²¹ *See SBC Opposition* at 2; *BellSouth Opposition* at 3; *Verizon Opposition* at 3-5; *USTA Opposition* at 3-4. The oppositions of SBC and Verizon fall particularly flat, in light of the fact that their respective mergers with AT&T and MCI are premised upon concentrating their efforts in the lucrative enterprise market, and are certainly not intended to attract additional single-line, low-income Lifeline eligible consumers that previously never had telephone service.

²² *See SBC Opposition* at 3.

Second, the opponents argue fleetingly (and unconvincingly) that Fones4All was, for some reason, obliged to file a petition for reconsideration of the *TRRO* either as a condition precedent to filing the Petition, or in lieu of it.²³ Again, however, the opponents fail to provide even a single citation to any rule or precedent that would require Fones4All to take such an action. Rather, the opponents simply assert that if Fones4All had filed a petition for reconsideration of the *TRRO*, it would have been untimely.²⁴ But such hypotheticals have no bearing on the fact that Fones4All has no procedural or legal obligation to seek reconsideration of the *TRRO*. Fones4All had no reason to file a reconsideration petition, nor is Fones4All under an statutory or legal compunction to do so. Instead, the Fones4All Petition asks the Commission to forbear from applying Rule 51.319(d) to carriers seeking to provide single line residential service to Lifeline eligible customers. Simply because that rule was promulgated in a proceeding in which Fones4All participated imposes no obligation upon Fones4All to file a reconsideration petition.

The only authority relied upon by any of the RBOCs in support of this proposition, the *Payphone Reclassification*²⁵ case cited by Verizon,²⁶ is absolutely off-point and irrelevant to the analysis here. There, the Commission held that it could not grant a motion styled by WorldCom as a Motion for Extension of Time to file a petition for reconsideration or in the Alternative, Recission, and thereby extend the deadline for filing of a reconsideration petition. Accordingly, contrary to Verizon's ludicrous characterization, the case does not impose an obligation that a party participating in an underlying rulemaking file a reconsideration petition as a condition

²³ See *USTA Opposition* at 3; *BellSouth Opposition* at 2-3; *Verizon Opposition* at 7.

²⁴ *Verizon Opposition* at 7.

²⁵ See Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 18 FCC Rcd 7615 (2003).

²⁶ *Id.*

precedent to the filing of a forbearance petition addressing rules promulgated in the underlying proceeding. There is no requirement that reconsideration be sought by Fones4All. The Commission is compelled to grant the instant Petition, and the opponents arguments to the contrary must be rejected.

Finally, in apparent recognition of the make-weight nature of their other lines of argument, and perhaps mindful of the degree to which the precedent cited in support of them are either inapposite or inconsistent with the propositions for which they are cited, the RBOCs attempt to shift the debate in this proceeding, from one about whether the criteria for forbearance from application of 51.319(d) is appropriate, to one that asks whether the Section 251 unbundling standards have been met. Despite allegations to the contrary, it is the opponents, not Fones4All, that attempt to rehash irrelevant Section 251 unbundling arguments here, and it is clear that in preparing their comments, the RBOCs have done little more than dust off their old UNE-P filings, which focus on the ubiquity of competitive switch deployments and the ferocity of “intermodal competition.” But as the Commission recognized in the *TracFone Order*, “the Act directs the Commission to consider whether ‘consumers in all regions of the Nation, *including low-income consumers* and those in rural, insular, and high cost areas, ... have access to telecommunications [services] ... at rates that are reasonably comparable to rates charged ... in urban areas.’ We therefore examine the facilities requirement from which TracFone seeks forbearance in light of the statute’s goal of providing low-income consumers with access to telecommunications services.”²⁷ The Commission must examine Fones4All’s forbearance request in the same way: in light of the statute’s goal of providing low-income consumers with

²⁷ *TracFone Order*, ¶ 10.

access to telecommunications services. At the conclusion of that analysis, the Commission must conclude that forbearance here is appropriate.

Section 10 imposes no requirement that the Commission undertake the Section 251 unbundling analysis the RBOCs argue is necessary. However, even if the Commission were to take the RBOCs' bait and examine the alternatives to basic wireline service allegedly available to Lifeline consumers, the Commission would find that the RBOCs' assertions do not withstand even the slightest scrutiny. With the exception of Verizon's misleading assertions regarding the alleged availability of substitutes for basic wireline Lifeline service (which substitutes supposedly include "cheap pre-paid wireless services"²⁸ and "\$15 dollar broadband service" that can be combined with "\$15 dollar VoIP services"),²⁹ absent from the initial comments of the RBOCs is even a suggestion that Lifeline eligible consumers currently served by Fones4All and other similarly situated competitors are now, or will ever in the future benefit from the

²⁸ In fact, the cheapest prepaid wireless available on the first web site to come up on a Google search of "prepaid wireless" is 300 minutes and 30 days of service for \$30, not including purchase of the hand set. See: https://www.net10.com/purchase_airtime.jsp?task=buyairtime&fromPopup=false (visited Nov. 8, 2005).

²⁹ See *Verizon Opposition* at 11, n. 20. The "evidence" cited by Verizon regarding the availability of \$15 broadband services supposedly available to Lifeline customers is nothing more than paid advertising aimed at business users of DSL services. Indeed, a typical advertisement is for "Sprint Business DSL service" which is likely is of little use to the average Lifeline eligible customer; see [US2005Deals.com\(http://us.2005deals.com/directory.php?cat=computing&sub=dsl\)](http://us.2005deals.com/directory.php?cat=computing&sub=dsl) (visited Nov. 8, 2005). The advertised services listed on the site, including the company in the number one position, Earthlink, do not provide service to most Lifeline end users. Inputting a residential address near Fones4All's offices into the "service availability" program for Earthlink reveals that the resident at the address could obtain the most basic service offered, the Earthlink Highspeed Cable service, at an introductory rate of \$29.95 per month for 6 months with an actual monthly service charge of \$41.95 per month. The \$14.99 rate touted by Verizon is available only from Verizon/Yahoo, but was not available for the residence we tested, located in a solidly middle income residential area. Covad, the second provider listed on the site, is able to provide at the same residence its most basic service, a "Dedicated Loop SOHO 1.5/3.84" service at a rate of \$74.95 with a rate one year contract. Clearly, a true, on-going \$15 per month DSL is not a reality for low income consumers or for most others.

intermodal or other such competition the RBOCs allege exists. Accordingly, as required by Section 10 of the Act, the Commission must exercise its forbearance authority where, as here, the on-going application of section 51.319(d) of the Commission's rules is harmful to the public interest in that it would stifle what little competition assists in the Lifeline wireline market for telecommunications service.

The initial commenters in this proceeding argue that the Petition fails to satisfy the statutory requirements for exercise of the Commission's forbearance authority under Section 10 of the Act because grant of the Petition would impose additional regulations upon ILECs. That is, BellSouth, SBC, Verizon and USTA argue that the Petition is an "improper use of the forbearance tool"³⁰ because grant of the petition would impermissibly impose unbundling obligations upon ILECs in a manner inconsistent with the "deregulatory goals of the Act."³¹ Specifically, they argue that grant of the Petition would surpass the Commission's authority under Section 10³² because "a petition pursuant to § 160 could never give rise to unbundling obligations under § 251(c)(3)."³³ This specious argument is clearly wrong and must fail.

Pursuant to 47 U.S.C. § 160(a), the Commission "shall forbear from applying *any regulation* or any provision" for which it determines the forbearance criteria are met.³⁴ The only limitation on the Commission's forbearance authority is set forth in 47 U.S.C. § 160(d), which prevents the Commission from exercising forbearance authority with respect to section 251(c) or 271 "until it determines that those requirements have been fully implemented."³⁵ Contrary to the

³⁰ *SBC Opposition* at 2.

³¹ *See SBC Opposition* at 2; *BellSouth Opposition* at 3; *Verizon Opposition* at 3-5; *USTA Opposition* at 3-4.

³² *See SBC Opposition* at 4.

³³ *Id.*, 6.

³⁴ 47 U.S.C. § 160(a) (emphasis added).

³⁵ 47 U.S.C. § 160(d).

initial commenters unsupported claims, nothing in Section 10 requires that each and every forbearance action decrease regulation upon ILECs, but rather only that all of the Section 10 criteria are met. Moreover, there is nothing in Section 10 which requires the Commission, in the conduct of its forbearance analysis, to undertake a Section 251(d)(2) unbundling analysis in addition to the Section 10 analysis simply because the regulation from which forbearance is sought relates to unbundling. At bottom, the RBOCs' strained reading the forbearance statute is inconsistent with a long line of Commission and judicial precedent interpreting it and should be summarily rejected.

The RBOCs layer their own interpretation upon the plain language of Section 160. That is, the RBOCs argue that that any application of Section 160 must necessarily result in a lessening of the legal obligations upon them. Clearly, this is not what the statute requires; this self-serving and illogical interpretation is inconsistent with the plain words of the statute and a long line of authority interpreting it. The Commission is well within its statutory authority to forbear from application of 47 C.F.R. § 51.319(d), and in fact is compelled to do so based upon the record of this proceeding.

Section 10 of the 1996 Act provides the Commission with the "authority to forbear from *applying any provision of the Act, or any of the Commission's regulations, if the Commission makes certain specified findings with respect to such provisions or regulations.*"³⁶ The Commission has held that "section 10 contemplates that the Commission may forbear from

³⁶ See Order, *Petition for Forbearance of Iowa Telecommunications Services, Inc. d/b/a/ Iowa Telecom Pursuant to 47 U.S.C. §160(c) from the Deadline for Price Cap Carriers to Elect Interstate Access Rates Based on the CALLS Order or a Forward Looking Cost Study*, 17 FCC Rcd 24319, ¶ 6 (2002) citing the Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996) (emphasis added).

applying pertinent regulations or statutory requirements...to the extent that they apply.”³⁷ As the Supreme Court recently noted, the Commission has the statutory authority under 47 U.S.C. § 160 “to forbear from imposing most Title II regulations.”³⁸ The rules set forth in 47 C.F.R. § 51.319(d) are clearly a “Commission regulations,” as the text of the rule is published in the Code of Federal Regulations, and sets forth certain regulations and requirements,³⁹ despite USTA’s incredible assertion that “the rules does not exist” and that “there is no rule, norm, requirement or regulation.”⁴⁰ Moreover, the rules set forth in 47 C.F.R. § 51.319(d) are clearly “Commission regulations” that “apply” to Fones4All (and other similarly situated carriers who utilize local circuit switching). To the extent that the Commission had so desired, it could have merely left blank the section of its rules pertaining to the provision of local circuit switching, but it did not. Instead, the FCC published words in 47 C.F.R. § 51.319(d) setting forth an affirmative regulations and/or requirements. Therefore, assuming that the other provisions of Section 10 of the Act are met (which they clearly are in this proceeding), the Commission is within its statutory authority to “forbear” from application of §51.319(d) of its rules. The Commission has found that “the word “forbear” in section 10 of the Act means “to desist from; cease.”⁴¹ In other words, when the Commission “forbears” it ceases from applying pertinent regulations or statutory requirements.⁴² Accordingly, based on the record in this proceeding, and the record in the *TracFone Order* proceeding, incorporated herein by reference, the Commission is well within its

³⁷ *Id.*

³⁸ See *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S.Ct. 2688, 2717 (2005).

³⁹ See <http://frwebgate.access.gpo.gov/cgi-bin/get-cfr.cgi>.

⁴⁰ See *USTA Opposition*, 3.

⁴¹ See Memorandum Opinion and Order, *Petition of SBC Communications, Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, 20 FCC Rcd 9361, ¶5 (2005) (“*SBC IP Forbearance Order*”).

⁴² *Id.*

statutory power to *forbear* from application of Section 51.319(d), even if it would leave the ILECs with some limited obligations.

However, application of Rule 51.319(d), both as it is currently being applied to Fones4All (preventing new Lifeline customers from being served by Fones4All and other similarly situated CLECs using ULS) and once it takes final effect on March 11, 2006 (cutting off all Lifeline customers served using ULS) precludes Lifeline eligible customers from taking advantage of service offerings from many market entrants who are currently using ULS to provide Lifeline, and effectively puts these customers at a crippling disadvantage compared to non-Lifeline end users. Furthermore, grant of the Petition will ensure that there are “facilities based” carriers other than the ILECs who are eligible to receive Lifeline support, and who are willing and able to compete in the low income market. That is, if the Commission refuses to grant forbearance from application of Rule 51.319(d), the Commission will effectively force all wireline carriers seeking to provide Lifeline service to be “facilities based” in the same way that application of Section 214(e) so requires, and in direct contradiction of the *TracFone Order*. Stated differently, to the extent that 51.319(d) applies, many CLECs who currently provide Lifeline using ULS will no longer provide Lifeline when faced with the choice of either: (1) building their own facilities; (2) or exiting the Lifeline market. Competitors who are forced to resell the ILECs’ services in the absence of ULS will not compete for Lifeline customers because they are not eligible for ETC status.

As the Commission explained in the *TracFone Order*, the prohibition on resellers being certified as ETCs (which led to the TracFone to file its Petition) is that resellers would be “double recovering” from the universal service fund. In the Commission’s own words,

[A] reseller that also received Lifeline support could recover twice: first because the benefit of the Lifeline support is reflected in the wholesale price and second

because the reseller also receives payment directly from the fund for the Lifeline customer. That, however, is not the case before us. TracFone as a CMRS provider, does not purchase Lifeline-supported services from incumbent LEC providers. Because TracFone's CMRS wholesale providers are not subject to section 251(c)(4) resale obligations, the resold services do not reflect a reduction in price due to Lifeline support. Therefore, we find that allowing TracFone to receive Lifeline support directly from the fund would not result in double recovery to TracFone and that the logic of the *1997 Universal Service Order* does not apply here.⁴³

Accordingly, resale under section 251(c)(4) is not a viable option for carriers seeking to provide Lifeline service to single line residential customers.

Failure to forbear from application of section 51.319(d), then will force a large number of carriers now providing service using ULS to their embedded base of ULS customers to revert to becoming pure resellers. In fact, Fones4All has been forced to provide service to thousands of customers using resale, however, resale is not an economically sustainable model, and once Fones4All ascertains the ultimate reach of the network it is deploying, many current Fones4All customers now being served using resale will likely lose their Fones4All service in the absence of the grant of this Petition. Accordingly, failing to forbear from Rule 51.319(d) will significantly chill what little competition exists for customers in the Lifeline market, while at the same time stifling product and service innovation, all to the detriment of Lifeline telecommunications consumers. The relief requested by Fones4All would promote and enhance competition for Lifeline eligible consumers. Therefore, the Commission's exercise of its forbearance authority under Section 10 of the Act is entirely consistent with the public interest.

⁴³ *TracFone Order*, ¶ 12.

IV. THE COMMISSION SHOULD GRANT THE FONES4ALL PETITION ON AN EXPEDITED BASIS WELL BEFORE THE MARCH 11, 2006 DEADLINE FOR FULL IMPLEMENTATION OF RULE 51.319(d)

Fones4All, and any other carrier that uses ULS to serve Lifeline eligible customers, faces a looming deadline of March 11, 2006. On that date, the 12 month transition period to migrate the embedded base of customers served using ULS expires, and those customers will be converted to resale, an unattractive proposition, given the pricing. Alternatively, the carrier will have to give appropriate notice to the relevant commissions and the customers affected by the withdrawal of the service. Given that Fones4All has demonstrated that the Petition meets the criteria warranting Section 10 forbearance, and given that the fast approaching deadline for the application of the provisions of Rule 51.319(d)(ii) place Fones4All's Lifeline customers at serious risk of losing their Fones4All service,⁴⁴ the Commission should promptly grant the Petition well in advance of its statutory 12 month deadline to Act. To the extent that the Commission elects to utilize all of the time provided under Section 10, the Petition will in many respects be moot, in light of the fact that carriers that will have exited the Lifeline market after the application of rule 51.319(d) are highly unlikely to re-enter the market to the extent that the Petition is granted many months later.⁴⁵

Under Section 47 U.S.C. § 160(c), the Commission has one year to act upon this Petition. Specifically § 160(c) provides:

(c) Petition for Forbearance.--Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority

⁴⁴ 47 C.F.R. § 51.319(d)(2)(ii).

⁴⁵ Even if Fones4All had filed the Petition on March 12, 2005, the day after section 51.319(d) became effective, Fones4All would find itself in the same circumstances: in serious jeopardy of needing to give notice to certain Lifeline customers of the withdrawal of service before the Commission is statutorily required to act on the Petition.

granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a). The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.⁴⁶

The Commission may grant itself a 90 day extension of the deadline if, and only if, “the Commission finds that an extension is necessary to meet the requirements of subsection (a).”⁴⁷

However, based upon the current record clearly demonstrating that all of the criteria for forbearance have been met, coupled with the exigent threat that Fones4All and similarly situated carriers are facing as a result of the March 11, 2006 deadline, the Commission should promptly grant this Petition.

But even if the Commission does not grant the Petition prior to March 11, 2006, under no circumstances should the Commission allow the Wireline Competition Bureau, acting on delegated authority, to grant itself on its own motion a 90 day extension of the deadline to act on the Petition. Rather, only the Commission, may grant the 90 day extension, and then only after making an affirmative, reviewable finding that it is necessary to meet the requirements of Section 10(a). As Commissioner Furchgott-Roth noted on more than one occasion:

Section 10 of the Communications Act is very clear: “The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a).” The statute is thus specific that it is the “Commission” which must grant any extension and must do so upon a finding that the extension is necessary to meet

⁴⁶ 47 U.S.C. § 160(c).

⁴⁷ *Id.*

the purposes of section 10(a). I do not believe that the Bureau, acting on its own motion and without even prior consultation with the “Commission,” can act to extend this statutory time-frame. I do not believe that the 90 day extension can be effectively used by the bureau without even briefing the Commission on the merits of the underlying petition, determining whether or not there are any new or novel questions of fact, law or policy, and receiving some signal from a majority of the “Commission” that an extension of time is warranted under these particular circumstances.⁴⁸

The record of this proceeding clearly demonstrates that the forbearance criteria have been met. The Commission is compelled to grant this petition and allow Fones4All and similarly situated carriers to continue providing competitive service to low income Americans consistent with the Act. There is no “necessary” or otherwise compelling need for the Commission to delay grant of the Petition.

V. CONCLUSION

For all the reasons set forth in these Reply Comments, as well as in Fones4All’s Petition, the Commission, should immediately grant the Petition and ensure that no Lifeline customer served by ULS loses the carrier of their choice. It is time for the Commission’s actions to match the words; the Commission should continue the steps it took in the TracFone Order to “take all possible steps to ensure that low income consumers are not barred from using available support on the basis of the specific technologies they wish to use or the specific business plans pursued by their service providers.”⁴⁹ Consistent with the discussion presented herein, the Commission is compelled to exercise its authority under Section 10 of the Act, and accordingly, to forbear from applying Rule 51.319(d).

⁴⁸ See Consolidated Separate Statement of Commissioner Harold Furchtgott-Roth, Sixth Memorandum Opinion and Order, *Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, 14 FCC Rcd 10,840 (1999).

⁴⁹ See *TracFone Order*, Statement of Commissioner Kathleen Q. Abernathy.

Respectfully submitted,

A handwritten signature in black ink that reads "Ross A. Buntrock". The signature is written in a cursive, flowing style.

Ross A. Buntrock

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November 14, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November 2005, I served copies of the foregoing "Reply Comments" on behalf of Fones4All Corporation by electronic filing and to the following parties by first-class mail, postage prepaid:

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Edilma Carr

ATTACHMENT A

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Petition of TracFone Wireless, Inc. for)	
Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47)	
C.F.R. § 54.201(i))	

ORDER

Adopted: September 6, 2005

Released: September 8, 2005

By the Commission: Commissioner Abernathy issuing a statement.

I. INTRODUCTION

1. In this Order, we address a petition filed by TracFone Wireless, Inc. (TracFone)¹ pursuant to section 10 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the Act)² requesting that the Commission forbear from the requirement that a carrier designated as an eligible telecommunications carrier (ETC) for purposes of federal universal service support provide services, at least in part, over its own facilities.³ TracFone requests that its eligibility for federal universal service support be limited to Lifeline only. Subject to the conditions that we describe below, we grant TracFone forbearance from the facilities requirement for ETC designation for Lifeline support only.⁴

II. BACKGROUND

2. Procedural History: TracFone is a non-facilities-based commercial mobile radio service (CMRS) provider (*i.e.*, a pure wireless reseller) that provides prepaid wireless telecommunications services. On June 8, 2004, TracFone filed a Petition for Forbearance from section 214(e) of the Act, which requires that an ETC offer service using its own facilities or a combination of its own facilities and resale of another carrier's services (Forbearance Petition or Petition).⁵ Contemporaneously with its Petition, TracFone filed

¹ TracFone Wireless, Inc. Petition for Forbearance, CC Docket No. 96-45, filed June 8, 2004 (Forbearance Petition or Petition). On February 17, 2005, pursuant to section 10(c) of the Act, the Wireline Competition Bureau (Bureau) extended until September 6, 2005, the date on which TracFone's Petition shall be deemed granted in the absence of a Commission decision that the Petition fails to meet the standard for forbearance under section 10(a). *TracFone Wireless, Inc.'s Petition for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i)*, CC Docket No. 96-45, Order, 20 FCC Rcd 3677 (2005).

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

³ 47 U.S.C. § 214(e).

⁴ We note that this grant of forbearance does not establish TracFone as an ETC. We will address TracFone's petitions for ETC designations in subsequent orders.

⁵ On June 24, 2004, the Bureau issued a Public Notice seeking comment on TracFone's Petition for Forbearance. *Parties are Invited to Comment on TracFone Wireless' Petition for Designation as an Eligible Telecommunications Carrier in the State of New York and Petition for Forbearance from Application of Section 214*, CC Docket No. 96-45, Public Notice, 19 FCC Rcd 11264 (2004). Comments and replies to the June 24th Public Notice were received

with the Commission petitions for ETC designation for several states.⁶ On August 8, 2004, TracFone, in its reply comments, and shortly thereafter in its applications for ETC designation, amended its Petition and related ETC applications to limit its eligibility for federal universal service support to the Lifeline portion of the low-income program.⁷ TracFone states that it will meet all ETC obligations except for the requirement to “own facilities” and commits to providing its Lifeline customers with access to E911 service, regardless of activation status and availability of prepaid minutes, and to requiring its customers to self-certify they are receiving only one Lifeline-supported service.⁸ On September 24, 2004, TracFone amended its Petition a second time to include a request for forbearance from section 54.201(i) of the Commission’s rules, which provides that state commissions shall not designate as an ETC a carrier that offers services supported by federal universal service support mechanisms exclusively through resale of another carrier’s service.⁹

3. Applicable Statutes and Rules: The Act provides that only an ETC shall be eligible for universal service support.¹⁰ To be eligible for ETC designation, a carrier must meet certain statutory requirements including offering service over its own facilities or a combination of its own facilities and resale of another

on July 26 and August 9, 2004, respectively. In response to certain comments, TracFone limited its Petition to Lifeline support in its August 9th reply comments. Because TracFone modified its Petition in its reply comments, commenters did not provide comment in the Forbearance proceeding on the Lifeline-only limitation. Despite this fact, commenters did address the Lifeline-only limitation in the related TracFone ETC proceedings, which TracFone likewise modified to reflect the request for limited universal service support. *See The Wireline Competition Bureau Seeks Comment on Petitions Concerning Eligible Telecommunications Designations and the Lifeline and Link-up Universal Service Support Mechanism*, CC Docket No. 96-45 and WC Docket No. 03-109, Public Notice, 19 FCC Rcd 20462 (2004).

⁶ TracFone has eight ETC petitions pending before the Commission. *See* TracFone Wireless, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of New York, CC Docket No. 96-45, filed June 8, 2004; TracFone Wireless, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, CC Docket No. 96-45, filed June 21, 2004; TracFone Wireless, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of Florida, CC Docket No. 96-45, filed June 21, 2004; TracFone Wireless, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of Connecticut, CC Docket No. 96-45, filed November 9, 2004; TracFone Wireless, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Massachusetts, CC Docket No. 96-45, filed November 9, 2004; TracFone Wireless, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of Alabama, CC Docket No. 96-45, filed November 9, 2004; TracFone Wireless, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of Tennessee, CC Docket No. 96-45, filed November 9, 2004; TracFone Wireless, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of North Carolina, CC Docket No. 96-45, filed November 9, 2004.

⁷ TracFone Reply Comments, filed August 9, at 2-3 (August Reply Comments). *See* TracFone Wireless, Inc. Amendment to Petition for Designation as an Eligible Telecommunications Carrier in the State of Florida, CC Docket No. 96-45, filed Aug. 16, 2004; TracFone Wireless, Inc. Amendment to Petition for Designation as an Eligible Telecommunications Carrier in the State of New York, CC Docket No. 96-45, filed Aug. 16, 2004; TracFone Wireless, Inc. Amendment to Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, CC Docket No. 96-45, filed Aug. 16, 2004.

⁸ TracFone Reply Comments, filed October 4, 2004, at 3-4 (October Reply Comments); August Reply Comments at 10.

⁹ 47 C.F.R. § 54.201(i); TracFone Wireless, Inc. Clarification of Petition for Forbearance, CC Docket No. 96-45, filed September 24, 2004.

¹⁰ 47 U.S.C. § 254(e).

carrier's service.¹¹ Only ETCs may receive high-cost and low-income support.¹² The low-income support mechanism of the universal service fund consists of the Lifeline and Link-Up programs.¹³

4. Collectively, the Lifeline and Link-Up programs are designed to reduce the monthly cost of telecommunications service and the cost of initial connection, respectively, for qualifying consumers. Lifeline provides low-income consumers with discounts of up to \$10.00 off of the monthly cost of telephone service.¹⁴ Link-Up provides low-income consumers with discounts of up to \$30.00 off of the initial costs of installing telephone service.¹⁵ Recognizing the unique needs and characteristics of tribal communities, enhanced Lifeline and Link-Up provide qualifying low-income individuals living on tribal lands with up to \$25.00 in additional discounts off the monthly costs of telephone service and up to \$70.00 more off the initial costs of installing telephone service.¹⁶ TracFone seeks eligibility to receive support only for the Lifeline portion of the low-income program.¹⁷

¹¹ 47 U.S.C. § 214(e)(1)(A).

¹² A carrier need not be an ETC to participate in the schools and libraries or rural health care programs. 47 U.S.C. § 254(h)(1)(A) and (B)(ii). See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9015, para. 449 (1997 *Universal Service Order*) (concluding that any telecommunications carrier, not just ETCs, may receive universal service support for providing supported services to schools and libraries); see also *Federal-State Joint Board on Universal Service*, CC Docket No. 96-46, Fourteenth Order on Reconsideration, 14 FCC Rcd 20106, 20114-5, para. 19 (1999) (*Fourteenth Order on Reconsideration*) (finding that although only ETCs may receive universal service support, a non-ETC that provides supported services to eligible rural health care providers may offset the value of the discount provided against its universal service contribution obligation and, to the extent such discount exceeds its contribution obligation, receive a refund).

¹³ 47 C.F.R. §§ 54.401, 54.411.

¹⁴ See 47 C.F.R. § 54.401(a)(2).

¹⁵ See 47 C.F.R. § 54.411(a)(1).

¹⁶ See 47 C.F.R. §§ 54.405(a)(4), 54.411(a)(3). Under the Commission's rules, there are four tiers of federal Lifeline support. All eligible subscribers receive Tier 1 support which provides a discount equal to the ETC's subscriber line charge. Tier 2 support provides an additional \$1.75 per month in federal support, available if all relevant state regulatory authorities approve such a reduction. (All fifty states have approved this reduction.) Tier 3 of federal support provides one half of the subscriber's state Lifeline support, up to a maximum of \$1.75. Only subscribers residing in a state that has established its own Lifeline/Link-Up program may receive Tier 3 support, assuming that the ETC has all necessary approvals to pass on the full amount of this total support in discounts to subscribers. Tier 4 support provides eligible subscribers living on tribal lands up to an additional \$25 per month towards reducing basic local service rates, but this discount cannot bring the subscriber's cost for basic local service to less than \$1. See 47 C.F.R. § 54.403.

¹⁷ August Reply Comments at 3 (requesting eligibility for Lifeline only support); October Reply Comments at 4 (specifying it does not seek eligibility for Link-Up support). TracFone has filed details of two proposed Lifeline plans. TracFone Wireless, Inc. *Ex Parte* Supplement to Petition for Forbearance and Petitions for Designation as an Eligible Telecommunications Carrier, CC Docket No. 96-45, at 3-5, filed July 15, 2005. The first plan, the "Pay-As-You-Go" Lifeline Plan, provides Lifeline customers with access to the network for one year and 30 minutes of airtime each month. Under TracFone's proposal, the cost of this plan would be completely subsidized by the Lifeline support. *Id.* at 3-4. The second plan, the "Net10 Pay-As-You-Go" Lifeline Plan, would require the Lifeline customer to purchase buckets of minutes to be used in an identified period of time that are discounted from TracFone's retail price to reflect the Lifeline subsidy. *Id.* at 4-5. One variation under this plan would require Lifeline customers to redeem coupons monthly. *Id.* TracFone states that, under any plan, the Administrator would provide support to TracFone as it does to all other recipients of Lifeline support; that is, TracFone's Lifeline support will be calculated on a monthly basis and distributed on a quarterly basis. Letter from Mitchell F. Brecher, Counsel for TracFone, to Marlene H. Dortch, FCC, CC Docket No. 96-45, at 3, filed August 22, 2005.

5. The Commission has in the past declined to extend ETC status to pure resellers. In the *1997 Universal Service Order*, the Commission found that the plain language of the statute requires that a carrier seeking ETC designation must own facilities, at least in part, thus precluding a carrier that offers services solely through resale from being designated as eligible.¹⁸ The Commission reasoned, without distinguishing among the various universal service support programs, that it was appropriate to deny pure resellers universal service support because pure resellers could receive the benefit of universal service support by purchasing wholesale services at a price that includes the universal service support received by the incumbent provider.¹⁹ Later in the *1997 Universal Service Order*, the Commission found that although resellers were not eligible to receive universal support directly, they were not precluded from offering Lifeline services. Resellers could offer Lifeline services by purchasing services at wholesale rates pursuant to section 251(c)(4) that reflect the customer-specific Lifeline support amount received by the incumbent local exchange company (LEC) and then passing these discounts through to qualifying low-income customers.²⁰ The Commission, in so finding, considered only that the underlying carrier was an incumbent LEC, subject to price-regulated resale obligations. Further, the Commission declined to forbear from the facilities requirement, finding that the statutory criteria had not been met.²¹ Making no finding with respect to the first two prongs, the Commission concluded that forbearance was not in the public interest because allowing pure resellers to receive universal service support would result in double recovery by the resellers.²² In making this finding, however, the Commission again did not distinguish among the various universal service support programs. Specifically, it did not consider whether providing only Lifeline support directly to a pure wireless reseller would result in double recovery.

III. DISCUSSION

6. For the reasons provided below, we conditionally grant TracFone's Petition and forbear from section 214(e) of the Act and sections 54.201(d)(1) and 54.201(i) of our rules for the purpose of considering its Petitions for ETC Designation for Lifeline support only.²³ If ultimately granted ETC status, TracFone will be eligible only for Lifeline support. As a limited ETC, TracFone would not be eligible to receive support for the other supported services under the low-income program nor would it be eligible, as an ETC, to receive support for services supported by the other universal support mechanisms.²⁴ We will address TracFone's petitions for ETC designation in subsequent orders. In sum, this grant is conditional on TracFone (a) providing its Lifeline customers with 911 and enhanced 911 (E911) access regardless of activation status and availability of prepaid minutes; (b) providing its Lifeline customers with E911-compliant handsets and replacing, at no additional charge to the customer, non-compliant handsets of existing customers who obtain Lifeline-supported service; (c) complying with conditions (a) and (b) as of the date it provides it provides Lifeline service; (d) obtaining a certification from each Public Safety

¹⁸ *Id.* at 8875, para. 178 (adopting Joint Board's analysis and conclusion); see *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 12 FCC Rcd 87, 172-73, paras. 160-161 (1996).

¹⁹ *1997 Universal Service Order*, 12 FCC Rcd at 8866, para. 161 and 8875, para. 178.

²⁰ *Id.* at 8972, para. 370. The Commission noted that it would reassess this approach in the future if the Lifeline program appeared to be under-utilized. *Id.*

²¹ *Id.* at 8875-6, para. 179.

²² *Id.*

²³ In addition, and on our own motion, we forbear from section 54.201(d)(1) of the Commission's rules. 47 C.F.R. § 54.201(d)(1). This section mirrors section 214(e) of the Act and requires that ETCs be facility-based, at least in part. We apply the same forbearance analysis we applied to section 214(e) to this section of our rules in determining that forbearance is warranted.

²⁴ See n.16, *supra*, for discussion regarding participation by non-ETCs in the schools and libraries and rural health care programs.

Answering Point (PSAP) where TracFone provides Lifeline service confirming that TracFone complies with condition (a); (e) requiring its customers to self-certify at time of service activation and annually thereafter that they are the head of household and receive Lifeline-supported service only from TracFone; and (f) establishing safeguards to prevent its customers from receiving multiple TracFone Lifeline subsidies at the same address.²⁵ Finally, as explained below, within thirty days of the release of this Order, we require TracFone to file with the Commission a plan outlining the measures it will take to implement these conditions.

7. Section 10 of the Act requires that the Commission forbear from applying any regulation or any provision of the Act to telecommunications services or telecommunications carriers, or classes thereof, in any or some of its or their geographic markets, if the Commission determines that the three conditions set forth in section 10(a) are satisfied. Specifically, section 10(a) provides that the Commission shall forbear from applying such provision or regulation if the Commission determines that:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.²⁶

8. In addition, when considering the public interest prong under section 10(a)(3), the Commission must consider “whether forbearance ... will promote competitive market conditions.”²⁷ If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.²⁸ Forbearance is warranted, however, only if all three prongs of the test are satisfied. For the reasons explained below, we find that TracFone satisfies all three prongs.

9. This Petition requires that we consider the statutory goals of two related but different provisions of the Act. We first examine the statutory goals of universal service in section 254 specifically in the

²⁵ Commenters have raised concerns about the administrative costs, complexities, and burdens of granting this Petition and presumably the associated ETC designation petitions. See Letter from Robin E. Tuttle, USTelecom, to Marlene Dortch, FCC, CC Docket No. 96-45 (filed August 17, 2005) (USTelecom August 17 *Ex Parte*). We believe that this conditional forbearance will serve to further the statutory goal of the providing telecommunications access to low-income subscribers while establishing the necessary safeguards to protect the universal service fund and the functioning of the low-income support mechanism. To the extent, however, that our predictive judgment proves incorrect and these conditions prove to be inadequate safeguards, the parties can file appropriate petitions with the Commission and the Commission has the option of reconsidering this forbearance ruling. See *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, WC Docket No. 01-338, Memorandum Opinion and Order, 19 FCC Rcd 21496, 21508-9, para. 26 n.85 (2004); see also *Petition of SBC Communications Inc. for Forbearance from Structural Separations Requirements of Section 272 of the Communications Act of 1934, As Amended, and Request for Relief to Provide International Directory Assistance Services*, CC Docket No. 97-172, Memorandum Opinion and Order, 19 FCC Rcd 5211, 5223-24, para. 19 n.66 (2004); *Cellnet Communications, Inc. v. FCC*, 149 F.3d 429, 442 (6th Cir. 1998). Additionally, we note that the conditions we impose here will be incorporated into any grant of the ETC designation petitions and any violation of such conditions may result in loss of ETC status.

²⁶ 47 U.S.C. § 160(a).

²⁷ 47 U.S.C. § 160(b).

²⁸ *Id.*

context of “low-income consumers.”²⁹ We then consider the statutory purpose underpinning the facilities requirement in section 214(e) as it relates to qualifying for federal low-income universal service support. After careful examination of the regulatory goals of universal service as applied to low-income consumers, we determine that a facilities requirement for ETC designation is not necessary to ensure that a pure wireless reseller’s charges, practices, classifications or regulations are just and reasonable when that carrier seeks such status solely for the purpose of providing Lifeline-supported services. Indeed, for the reasons provided below, we find that the facilities requirement impedes greater utilization of Lifeline-supported services provided by a pure wireless reseller.

10. Universal service has been a fundamental goal of federal telecommunications regulation since the passage of the Communications Act of 1934.³⁰ Congress renewed its concern for low-income consumers in the Telecommunications Act of 1996 when it established the principles that guide the advancement and preservation of universal service.³¹ Specifically, the Act directs the Commission to consider whether “consumers in all regions of the Nation, *including low-income consumers and those in rural, insular, and high cost areas*, ... have access to telecommunications [services] ... at rates that are reasonably comparable to rates charged ... *in urban areas*.”³² We therefore examine the facilities requirement from which TracFone seeks forbearance in light of the statute’s goal of providing low-income consumers with access to telecommunications services.

11. Just and Reasonable: As an initial matter, we note that a provision or regulation is “necessary” if there is a strong connection between the requirement and regulatory goal.³³ Section 10(a)(1) requires that we consider whether enforcement of the facilities-based requirement of section 214(e) for a pure wireless reseller that seeks ETC designation for Lifeline support only is necessary to ensure that the charges, practices, classifications or regulations are just and reasonable and not unjustly or unreasonably discriminatory.

12. We find that the facilities requirement is not necessary to ensure that TracFone’s charges, practices, and classifications are just and reasonable and not unjustly or unreasonably discriminatory where it is providing Lifeline service only. The Commission has in the past declined to extend ETC status to pure resellers because it was concerned about double recovery of universal service support.³⁴ In making this decision, however, the Commission considered the issue in the context of wireline resellers and without differentiating among the types of universal service support and the basis of distribution. Lifeline support, designed to reduce the monthly cost of telecommunications services for eligible consumers, is distributed on a per-customer basis and is directly reflected in the price that the eligible customer pays.³⁵ Because it is customer-specific, a carrier who loses a Lifeline customer to a reseller would no longer receive the Lifeline support to pass through to that customer. Thus, a wireless reseller who serves a Lifeline-eligible customer and receives Lifeline support directly from the fund does not receive a double recovery. By comparison, where the wholesale carrier is an incumbent LEC subject to price-regulated resale under section 251(c)(4), the rate at which the reseller obtains the wholesale service is based on a state-mandated percentage

²⁹ 47 U.S.C. § 254(b)(3).

³⁰ 47 U.S.C. § 151 (“to make available, so far as possible, *to all the people* of the United States ... a rapid, efficient, Nation-wide, and world-wide wire and communication service with adequate facilities at reasonable rates”) (emphasis added).

³¹ 47 U.S.C. § 254(b); see *1997 Universal Service Order*, 12 FCC Rcd at 8789, para. 21 and 8793, para. 27.

³² 47 U.S.C. § 254(b)(3) (emphasis added).

³³ See *CTIA v. FCC*, 330 F.3d 502, 512 (2003).

³⁴ *1997 Universal Service Order*, 12 FCC Rcd at 8861, 8873, 8875, paras. 151-152, 174, and 178.

³⁵ 47 C.F.R. §§ 54.401, 54.504.

discount off of the incumbent LEC's retail rate for the service, and any Lifeline support received by the incumbent LEC would therefore be reflected in the price charged to the reseller.³⁶ In this scenario, a reseller that also received Lifeline support could recover twice: first because the benefit of the Lifeline support is reflected in the wholesale price and second because the reseller also receives payment directly from the fund for the Lifeline customer. That, however, is not the case before us. TracFone, as a CMRS provider, does not purchase Lifeline-supported services from incumbent LEC providers. Because TracFone's CMRS wholesale providers are not subject to section 251(c)(4) resale obligations, the resold services do not reflect a reduction in price due to Lifeline support. Therefore, we find that allowing TracFone to receive Lifeline support directly from the fund would not result in double recovery to TracFone and that the logic of the *1997 Universal Service Order* does not apply here.

13. We agree with TracFone that, as a reseller, it is by definition subject to competition and that this competition ensures that its rates are just and reasonable and not unjustly or unreasonably discriminatory.³⁷ We note that TracFone's Lifeline offering will compete with at least one other Lifeline offering whether from the underlying CMRS provider, if an ETC, or from the incumbent wireline carrier.³⁸ We also believe that this competition will spur innovation amongst carriers in their Lifeline offerings, expanding the choice of Lifeline products for eligible consumers. We note that TracFone has created a wireless prepaid product that is neither dependent upon the retail service offerings of its underlying carriers nor simply a rebranding of the underlying carrier's retail service offering which may provide a valuable alternative to eligible consumers.³⁹

14. For the reasons provided above, we find that the requirements of the first prong of section 10(a) are met. Where, as here, the wireless reseller is forgoing all universal service support but Lifeline, which is customer-specific and is designed to make telecommunication service affordable to eligible consumers, the facilities requirement is unnecessary to preserve the integrity of the universal service program or the fund. By limiting TracFone's eligibility to Lifeline support, the facilities requirement is not necessary to ensure that TracFone's charges, practices, and classifications are just and reasonable.

15. Consumer Protection: Section 10(a)(2) requires that we consider whether enforcement of the facilities-based requirement of section 214(e) for a pure wireless reseller that seeks ETC designation only for Lifeline support is necessary for the protection of consumers. We find that imposing a facilities requirement on a pure wireless reseller is not necessary for the protection of consumers subject to the conditions described below. Specifically, we conclude that forbearance from this provision will actually benefit consumers. Indeed, if TracFone is ultimately granted limited ETC status, it would be offering Lifeline-eligible consumers a choice of providers not available to such consumers today for accessing telecommunications services. The prepaid feature may be an attractive alternative for such consumers who need the mobility, security, and convenience of a wireless phone but who are concerned about usage charges or long-term contracts. We also note that TracFone has committed to ensuring that all of its consumers will be able to place enhanced 911 (E911) calls from their handsets even if the consumer's service is not active or does not have prepaid minutes available.⁴⁰

³⁶ See 47 C.F.R. § 251(c)(4).

³⁷ Forbearance Petition at 5.

³⁸ See 47 C.F.R. § 54.405(a) (requiring ETCs to offer Lifeline service).

³⁹ TracFone states that its customers pay in advance for minutes of use, without term contracts or termination fees, other extraneous or pass-through fees, credit checks, or deposits. TracFone also states that its pricing is uniform across its service areas despite the costs associated with any particular underlying carrier. Forbearance Petition at 3-4.

⁴⁰ August Reply Comments at 10.

16. Given the importance of public safety, we condition this grant of forbearance on TracFone's compliance with the E911 requirements applicable to wireless resellers, as modified below, for all Lifeline customers. In light of the condition discussed below, that TracFone ensure its customers receive only one Lifeline-supported service, we find it essential that TracFone's Lifeline-supported service be capable of providing emergency access. Given the possibility that this Lifeline-supported service will be the customers' only means of accessing emergency personnel, we require that TracFone provide its Lifeline customers with access to basic and E911 service immediately upon activation of service.⁴¹ We note that this condition is consistent with TracFone's representation that its Lifeline customers will be able to make emergency calls at any time.⁴² To demonstrate compliance with this condition, TracFone must obtain a certification from each PSAP where it provides Lifeline service confirming that TracFone provides its customers with access to basic and E911 service. TracFone must furnish copies of these certifications to the Commission upon request.⁴³ As an additional condition, TracFone must provide only E911-compliant handsets to its Lifeline customers, and must replace any non-compliant handset of an existing customer that obtains Lifeline-supported service with an E911-compliant handset, at no charge to the customer. The Commission has an obligation to promote "safety of life and property" and to "encourage and facilitate the prompt deployment throughout the United States of a seamless, ubiquitous, and reliable end-to-end infrastructure" for public safety.⁴⁴ The provision of 911 and E911 services is critical to our nation's ability to respond to a host of crises, and this Commission has a longstanding and continuing commitment to a nationwide communications system that promotes the safety and welfare of all Americans, including Lifeline customers.⁴⁵ We believe that these conditions are necessary to ensure that TracFone's Lifeline customers have meaningful access to emergency services. We reiterate that, with the possibility that the Lifeline service will be the customer's only access to emergency services and given the potential gravity of harm if such Lifeline customers cannot obtain such access, we believe that these conditions will further the protection of such Lifeline customers.

17. We are not persuaded by some commenters' concerns regarding the impact on the size of the universal service fund and the associated contribution obligation if we grant this Petition.⁴⁶ Because section 10(a)(2) requires that we consider the welfare of all "consumers," we must consider the effect a grant of this Petition will have on consumers who will likely shoulder the effects of any increased contribution obligation since carriers are permitted to recover their contribution obligations from

⁴¹ Under section 20.18(m) of our rules, wireless resellers have an independent obligation, beginning December 31, 2006, to provide access to basic and E911 service, to the extent that the underlying facilities-based licensee has deployed the facilities necessary to deliver E911 information to the appropriate PSAP. 47 C.F.R. § 20.18(m). Section 20.18(m) further provides that resellers have an independent obligation to ensure that all handsets or other devices offered to their customers for voice communications are location-capable. *Id.* Under our rules, this obligation applies only to new handsets sold after December 31, 2006. *Id.* As a condition of this grant of forbearance, however, we require that TracFone, if granted ETC status, meet the requirements of section 20.18(m) for all of its Lifeline customers as of the date it provides such Lifeline service.

⁴² August Reply Comments at 10 (given E911 capabilities of its service and handsets, TracFone envisions that its service "really will serve as a 'lifeline' for those eligible customers participating in the program").

⁴³ We recognize that, as a practical matter, if TracFone's underlying facilities-based licensee has not deployed the facilities necessary to deliver E911 information to the appropriate PSAP, TracFone will not be able to offer Lifeline-supported service to customers residing in that area.

⁴⁴ *Applications of Nextel Communications, Inc. and Sprint Corporation For Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 05-63, Memorandum and Order, FCC 05-148, para. 144 (rel. August 8, 2005).

⁴⁵ *Id.*

⁴⁶ See, e.g., Comments of TDS Telecommunications Corp., filed September 20, 2004, at 5-6 (TDS Comments).

customers.⁴⁷ If TracFone is able to obtain ETC designation for Lifeline-only services, we do not expect this to significantly burden the universal service fund and thus negatively affect consumers through increased pass-through charges of the carriers' contribution obligations. The Commission has recognized the potential growth of the fund associated with high-cost support distributed to competitive ETCs.⁴⁸ TracFone, however, would not be eligible for high-cost support. In 2004, low-income support accounted for only 14 percent of the distribution of the total universal service fund; whereas, high-cost support accounted for 64.2 percent.⁴⁹ Any increase in the size of the fund would be minimal and is outweighed by the benefit of increasing eligible participation in the Lifeline program, furthering the statutory goal of providing access to low-income consumers. Significantly, granting TracFone's Petition will not have any effect on the number of persons eligible for Lifeline support.

18. We further safeguard the fund by imposing additional conditions on this grant of forbearance. Specifically, as a further condition of this grant of forbearance and in addition to all other required certifications under the program, we require that TracFone require its Lifeline customers to self-certify under penalty of perjury upon service activation and then annually thereafter that they are the head of household and only receive Lifeline-supported service from TracFone.⁵⁰ The penalties for perjury must be clearly stated on the certification form. Additionally, in order to further strengthen the head of household requirement, we require that TracFone track its Lifeline customer's primary residential address and prohibit more than one supported TracFone service at each residential address.⁵¹ These conditions are consistent with TracFone's representations in the record.⁵² In light of these safeguards, we are not dissuaded from granting forbearance by concerns of double recovery relating to customers receiving Lifeline support for more than one service.⁵³ We recognize, however, that the potential for more than one

⁴⁷ See 47 C.F.R. § 54.712.

⁴⁸ See *Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, 19 FCC Rcd 1563, 1577, para. 31 (2004); see also *Federal-State Joint Board on Universal Service, Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, 19 FCC Rcd 6422, 6433-4, para. 25 (2004).

⁴⁹ Wireline Competition Bureau, Federal Communications Commission, *Trends in Telephone Service*, Table 19.1 and Chart 19.1 (June 2005). As of March 2004, the average monthly federal support per non-tribal Lifeline customer was \$8.55. *Id.* at Table 19.7. See 47 C.F.R. § 54.403. Tribal customers are eligible for up to an additional \$25 per month in Lifeline support. 47 C.F.R. § 54.403(a)(4).

⁵⁰ October Reply Comments at 3-4 (commitment to require Lifeline customers to self-certify that they do not receive support from any other carrier). To monitor compliance, we require that TracFone maintain the self-certifications and provide such documentation to the Commission upon request.

⁵¹ See Reply Comments of TracFone Wireless, Inc. to Petition for ETC Designation in Virginia, filed September 7, 2004, at 7-8 (fully capable of fulfilling all record keeping requirements and has the ability to track each consumer's primary residence). See also Letter from Mitchell F. Brecher, Counsel for TracFone, to Marlene H. Dortch, FCC, CC Docket No. 96-45, filed July 13, 2005 (capable of fulfilling certification and verification requirements) (TracFone July 13 *Ex Parte*).

⁵² See n.56 and n.57 above. We point out that these conditions are in addition to, and do not supplant, the certification and verification eligibility already required by our rules for federal default states and any similar state rules for the non-federal default states. See, e.g., 47 C.F.R. § 54.410 (requiring initial certification and annual verification of eligibility).

⁵³ See TDS Comments at 5-6; Reply Comments of the United State Telecom Association, filed October 4, 2004, at 6 and n.18; letter from Katherine O'Hara, Verizon, to Marlene H. Dortch, FCC, CC Docket No. 96-45, at 1, filed August 9, 2005 (Verizon *Ex Parte*); USTelecom August 17 *Ex Parte* at 4.

Lifeline-supported service per eligible consumer is an industry-wide problem.⁵⁴ We are confident that these conditions of this grant of forbearance will eliminate this concern with respect to TracFone's customers. Additionally, we encourage comment on this issue in the *Comprehensive Universal Services Program Management* proceeding to address the potential for abuse throughout the industry.⁵⁵

19. USTelecom raised concerns about the fact that TracFone distributes its service through retail outlets.⁵⁶ USTelecom argues that TracFone will not have the requisite control over the retailer's employees to ensure compliance with Lifeline rules and certifications. We recognize that this may be a problem and thus require that TracFone distribute its Lifeline service directly to its Lifeline customers. Specifically, customers may purchase handsets at TracFone's retail outlets, however, we require that TracFone deal directly with the customer to certify and verify the customer's Lifeline eligibility. Of the two methods for certifying and verifying customer eligibility offered by TracFone, we reject the point of sale procedures that would allow TracFone Lifeline customers to submit qualifying information to the retail vendor.⁵⁷ TracFone must have direct contact with the customer, whether by telephone, fax, Internet, in-person consultation or otherwise, when establishing initial and continued eligibility.

20. Certain commenters argue that the prepaid, resold nature of TracFone's proposed service offering will facilitate fraud, waste, and abuse in the Lifeline program.⁵⁸ We find that this concern is more properly addressed in any order resolving TracFone's petitions for designation as an ETC. In the ETC designation proceedings, if TracFone's petitions are granted, we will address how Lifeline support will be calculated and distributed if the prepaid nature of TracFone's service offering requires such clarification.

21. In light of the conditions we have outlined here, we believe that appropriate safeguards are in place to deter waste, fraud, and abuse. We strive to balance our objective of increasing participation in the low-income program with our objective of preventing and deterring waste, fraud, and abuse. We find that we have struck the appropriate balance here. We are also mindful of the fact that other prepaid pure wireless carriers may similarly seek eligibility for Lifeline-only support. Given the safeguards we put in place aimed at ensuring that only eligible consumers receive such support and that they receive such support only once, we do not believe that similar requests will have a detrimental impact on the fund. We note that to the extent any similarly situated prepaid wireless reseller seeks forbearance from these requirements for the purpose of providing only Lifeline support, it will be expected to comply with all the conditions we impose upon TracFone herein.

22. Accordingly, we find that, subject to the 911 and E911 conditions and the self-certification and address limitation conditions set out above, the ETC facilities-based requirement is not necessary for consumer protection. We thus conclude that the second prong of section 10(a) is satisfied.

23. Public Interest: Section 10(a)(3) requires that we consider whether enforcement of the facilities-based requirement of section 214(e) for a pure wireless reseller that seeks ETC designation for Lifeline

⁵⁴ See Verizon *Ex Parte* at 1; USTelecom August 17 *Ex Parte* at 2, 4.

⁵⁵ See *Comprehensive Review of Universal Service Fund Management, Administration, and Oversight, Federal State Joint Board on Universal Service, Schools and Libraries Universal Service Support Mechanism, Rural Health Care Support Mechanism, Lifeline and Link-Up, Changes to the Board of Directors for the National Exchange Carrier Association, Inc.*, WC Docket Nos. 05-195, 02-60, 03-109 and CC Docket Nos. 96-45, 97-21, FCC 05-124, para. 22 (rel. June 14, 2005) (*Comprehensive Universal Services Program Management*).

⁵⁶ See USTelecom August 17 *Ex Parte* at 4.

⁵⁷ TracFone July 13 *Ex Parte* at 2-3.

⁵⁸ Letter from Jeffrey S. Lanning, USTelecom, to Marlene H. Dortch, FCC, CC Docket No. 96-45, at 3-5, filed August 26, 2005; Reply Comments of Verizon, filed October 4, 2004, at 3.

support only is in the public interest. In this instance, based on the record before us, we find that the statutory goal of providing telecommunications access to low-income consumers outweighs the requirement that TracFone own facilities, where TracFone, should it be designated an ETC, will be eligible only for Lifeline support. Thus, we find that requiring TracFone, as a wireless reseller, to own facilities does not necessarily further the statutory goals of the low-income program, which is to provide support to qualifying low-income consumers throughout the nation, regardless of where they live.

24. The Lifeline program is designed to reduce the monthly cost of telecommunications service for qualifying low-income consumers.⁵⁹ Presently only about one-third of households eligible for low-income assistance actually subscribe to the program.⁶⁰ We recently expanded eligibility criteria and outreach guidelines for federal default states in an effort to increase participation.⁶¹ On July 26, 2005, we launched a joint initiative with the National Association of Regulatory Utility Commissioners to raise awareness of our Lifeline and Link-Up programs among low-income consumers.⁶² We believe even more can be done to further expand participation to those subscribers that qualify and thus further the statutory goal of section 254(b). Therefore, consistent with the Commission's assertion in the *1997 Universal Service Order* concerning under-utilization of the program, we conclude it is appropriate to consider the relief requested with the goal of expanding eligible participation in the program.⁶³ With only about one-third of Lifeline-eligible households actually subscribing, we believe that granting TracFone's Petition serves the public interest in that it should expand participation of qualifying consumers. Accordingly, we conclude that forbearing from the facilities requirement for Lifeline support only, subject to the conditions set forth above satisfies the requirements of section 10(a)(3).

25. Within thirty days of this release of this Order, we require that TracFone file with the Commission a plan outlining the measures it will take to implement the conditions outlined in this Order. This plan will be placed on public notice and will be considered by the Commission in TracFone's ETC designation proceedings. For the foregoing reasons and subject to the conditions above, we find that the third prong of section 10(a) is satisfied.

26. Finally, we reject USTelecom's argument that TracFone has not requested forbearance from the facilities requirement in section 254(e) and that without such forbearance TracFone cannot fulfill the obligations of an ETC. Specifically, section 254(e) requires that "a carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."⁶⁴ USTelecom emphasizes that the words "facilities" and "services" are joined by the conjunctive article "and" and therefore an ETC must use any universal support received for facilities as well as services.⁶⁵ We disagree with USTelecom's interpretation. First, we read this provision together with the sentence that precedes it. The preceding sentence states that only an ETC "shall be eligible to receive *specific* Federal universal service support."⁶⁶ The next sentence, which USTelecom quotes, then

⁵⁹ 47 C.F.R. § 54.401.

⁶⁰ *Lifeline and Link-Up*, WC Docket No. 03-109, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 8302, 8305, para. 1 and Appendix K at Table I.B.

⁶¹ *Id.* at 8305, para. 1.

⁶² *FCC and NARUC Launch "Lifeline Across America" to Raise Awareness of Lifeline and Link-Up Programs*, News Release, July 26, 2005.

⁶³ *1997 Universal Service Order*, 12 FCC Rcd at 8972, para. 370.

⁶⁴ 47 U.S.C. § 254(e).

⁶⁵ USTelecom August 17 *Ex Parte* at 5 n.1.

⁶⁶ 47 U.S.C. § 254(e) (emphasis added).

requires that “*such* service”, which we find refers to the specific universal support from the previous sentence, be used only for purposes “for which the support is intended.” Reading these sentences together in their entirety, we find that Congress intended that a carrier must use the universal support received to meet the goals of the specific support mechanism under which it was distributed. For example, a carrier who receives specific Lifeline support must use that support to reduce the price of access to telecommunications services for the eligible customer. Second, we note that not all the nominalized verbs in the sentence quoted by USTelecom, “provision,” “maintenance,” and “upgrading,” can be read to apply to both facilities and services. What for example would it mean to “maintain” a “service” apart from the “facilities”? We also note that the nominalized verbs themselves are joined by the conjunctive article “and”. Therefore, extending USTelecom’s logic, any universal support received by a carrier must always be used for the provision, maintenance, *and* upgrading of *both* facilities and services. The terms maintenance and upgrading as generally associated with a carrier’s network and not with service itself. Thus, USTelecom’s reading of section 254(e) would require us to interpret the term “service” as surplusage – a result that must be avoided when the statute admits to other interpretations.⁶⁷ We find the more appropriate reading is to consider these terms in the disjunctive. Thus, we conclude that an ETC receiving Lifeline support uses this specific universal service support for the purposes for which it was intended when it reduces the price of the Lifeline service by the amount of the support.

IV. ORDERING CLAUSE

27. Accordingly, IT IS ORDERED THAT, pursuant to sections 4(i), 10, 214, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 160, 214, and 254, the Petition for Forbearance filed by TracFone Wireless, Inc. on June 8, 2004, and amended on August 9, 2004 and September 24, 2004, IS GRANTED subject to the conditions set forth above and, on our own motion, we forbear from enforcing 47 C.F.R. § 54.201(1)(d).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁶⁷ See, e.g., *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

**STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY**

*Re: Federal-State Joint Board on Universal Service; Petition of TracFone Wireless, Inc. for
Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i) (CC Docket No. 96-45).*

I am very pleased to join in today's decision, which will help expand the availability of Lifeline subsidies to low-income users of resold wireless telecommunications services. In the 1996 Act, Congress directed the Commission to ensure that all Americans, "including low-income consumers," have access to telecommunications services and information services. One critical component of the Commission's effort to guarantee such access is the Lifeline program, which provides discounts to monthly telephone service for the less fortunate among us. Unfortunately, however, a 2004 analysis performed by Commission staff indicated that only about a third of households eligible for Lifeline support actually subscribe to the program.

While it is clear that today's action will not close that gap on its own, I believe it is essential that we take all possible steps to ensure that low-income users are not barred from utilizing available support on the basis of the specific technologies they wish to use or the specific business plans pursued by their service providers. By providing support to resold wireless services, we are indeed extending a "line" to customers who might not otherwise make use of the Lifeline program, and thus are helping to fulfill Congress's vision of truly *universal* service.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link-Up)	WC Docket No. 03-109
)	
Petitions Concerning Eligible)	
Telecommunications Carrier Designations)	
and the Lifeline and Link-Up Universal)	
Service Support Mechanism)	
)	

REPLY COMMENTS OF TRACFONE WIRELESS, INC.

TracFone Wireless, Inc. ("TracFone"), by its attorneys, hereby submits its reply comments in response to comments which were filed on or about September 20, 2004 in response to a request by the Wireline Competition Bureau for comment on various filings concerning eligible telecommunications carrier ("ETC") designations and the Lifeline and Link-Up universal service mechanism.¹ Commenters addressed both a petition for reconsideration filed by AT&T Corporation ("AT&T") in which AT&T asks the Commission to modify its rules governing certification as an ETC to receive low income support from the federal Universal Service Fund ("USF"),² and TracFone's amendments to its petitions for ETC designation in

¹ See Public Notice – The Wireline Competition Bureau Seeks Comment on Petitions Concerning Eligible Telecommunications Designations and the Lifeline and Link-Up Universal Service Support Mechanism, CC Docket No. 96-45 and WC Docket No. 03-109, DA 04-2750, released August 30, 2004.

² See AT&T Corp. Petition for Limited Reconsideration, WC Docket No. 03-109, filed July 21, 2004) ("AT&T Petition").

which TracFone has limited its petitions to request only low income support from the USF.³ TracFone's reply comments solely focus on comments related to TracFone's decision to utilize its ETC status only to provide Lifeline service to qualified low income consumers. TracFone takes no position on AT&T's request that the Commission should amend its rules to provide for separate ETC certification for high cost support and for Lifeline. None of the comments alter the conclusion that the restricted scope of TracFone's ETC petitions is consistent with the applicable laws and regulations governing universal service and with the public interest.

Comments opposing TracFone's decision to use its ETC status to only seek disbursements from the USF low income program demonstrate a failure to comprehend TracFone's position and the regulations governing the low income and high cost USF mechanisms. As TracFone explained in its initial comments, TracFone's decision to seek only disbursements from the USF to support its proposed Lifeline program is lawful and consistent with current Commission rules, and therefore, does not require any revisions to the Commission's rules.⁴ TDS Telecommunications Corp. ("TDS Telecom") and Verizon inaccurately characterize TracFone's petitions, as amended, as requesting a change in the ETC designation process.⁵ TDS Telecom inaccurately states that TracFone believes its ETC petitions should be subject to a different public analysis standard than petitions seeking ETC designation

³ See TracFone Wireless, Inc. Amendment to Petition for Designation as an Eligible Telecommunications Carrier in the State of Florida, CC Docket No. 96-45, filed Aug. 16, 2004; TracFone Wireless, Inc. Amendment to Petition for Designation as an Eligible Telecommunications Carrier in the State of New York, CC Docket No. 96-45, filed Aug. 16, 2004; TracFone Wireless, Inc. Amendment to Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, CC Docket No. 96-45, filed Aug. 16, 2004.

⁴ Comments of TracFone, at 2-3; see Comments of the Oklahoma Rural Telephone Companies ("ORTC"), at 2-3.

⁵ See Comments of TDS Telecom, at 7; Comments of Verizon, at 6. TDS Telecom and Verizon acknowledge that the Lifeline program is underutilized by eligible consumers.

for both low income and high cost support.⁶ The Rural Iowa Independent Telephone Association (“RIITA”) also wrongly implies that TracFone does not intend to meet the ETC qualification criteria.⁷ TracFone’s ETC petitions, as amended, demonstrate that TracFone intends to, and does, meet all requirements to be designated as an ETC (except for the “facilities-based requirement of Section 214(e) for which it has petitioned for forbearance).

TracFone’s decision to limit its request for disbursements from the USF to Lifeline support is consistent with statutes and regulations concerning the designation of ETCs and would promote the public interest in making affordable wireless telecommunications service available to all Americans, including low income consumers. Verizon incorrectly asserts that allowing TracFone to only request low income support from the USF “would mean that customers soon might have to face the choice of receiving Lifeline support from one carrier, or high cost support from another, but not both supported services from one ETC.”⁸ Verizon’s concern is not justified. First, as an ETC, TracFone would be required to provide all services listed in Section 54.101 of the Commission’s Rules (47 C.F.R. § 54.101) throughout its designated area, including all high cost areas, even if TracFone determined that it would not seek high cost support from the USF. Second, while eligible customers can choose to receive services supported by the low income universal service program, customers have no choice regarding whether they receive services supported by the high cost program. Therefore, customers will not be faced with the choice posited by Verizon. Verizon also stated a concern with customers being able to receive Lifeline service for more than one line. TracFone will ensure that customers only receive

⁶ Comments of TDS Telecom, at 3 & n.8.

⁷ Comments of RIITA, at 2; see also Comments of United States Telecom Association (“USTA”), at 6.

⁸ Comments of Verizon, at 3-4.

Lifeline service for one line by requiring them to certify in writing, at the time of purchasing TracFone's service, that they are not receiving Lifeline service from any other carrier.

Moreover, TracFone's Lifeline proposal complies with Commission regulations governing the universal service low income support program. TracFone does not plan to offer LinkUp services to customers because such services are unnecessary. LinkUp support reimburses local service providers for providing discounted home telephone service connections. TracFone does not charge customers for service connections, and therefore, there is no need to offer LinkUp services supported by the Universal Service Fund. The statement by the National Association of State Utility Consumer Advocates ("NASUCA") that LinkUp support should apply to TracFone customers' purchase of cellular phones does not change TracFone's position that it is not required to offer LinkUp services.⁹ The LinkUp program pays eligible consumers a portion of the installation or activation fee for wireline or wireless service, but does not apply to handsets.¹⁰

NASUCA's concern that TracFone's Lifeline service proposal would be less affordable than "plain old telephone service of the ILEC" is irrelevant to whether TracFone's proposal would promote the public interest.¹¹ This concern ignores the fact that wireless service offers unique advantages to low income consumers, such as mobility, security, and convenience, that are not available from traditional wireline service.¹² Moreover, as effectively explained by the League of United Latin American Citizens ("LULAC") in its comments, for some consumers,

⁹ See Comments of NASUCA, at 8.

¹⁰ See Get Connected: Afford-A-Phone, A Lifeline Assistance and Link-Up America Outreach Program, *available at* www.fcc.gov/cgb/getconnected/faqs.html.

¹¹ See Comments of NASUCA, at 7-8.

¹² See Comments of American Foundation for the Blind ("AFB") (access to wireless service is "a vital foundation for public safety and full participation in society").

pre-paid wireless phone service, like that offered by TracFone, is the lowest cost alternative for obtaining wireless service. LULAC notes that although per minute charges may be higher for pre-paid service than for post-paid service, consumers utilizing pre-paid wireless service “can pay much less per month than they would, if locked into an annual contract with a set monthly charge.”¹³ Moreover, pre-paid wireless service allows consumers to more easily stay within a budget, since there is no potential for such consumers to incur late payment charges or additional charges for making calls beyond the calling minutes allotted per month.¹⁴

ORTC’s suggestion that it is premature for the Commission to consider TracFone’s petitions because the Commission is conducting a proceeding that could affect the designation of ETCs and has not yet established a minimum standards for ETC offerings is unjustified and ignores the reality of conducting business in a regulated industry. Carriers subject to regulation by the Commission are continuously impacted by Commission decisions that interpret or amend the Commission’s rules or establish new rules. The Commission may not cease applying current rules to carriers simply because there is a proceeding that may result in changes to those rules. Neither should it defer action on matters that are governed by existing rules simply because those rules may be subject to possible revision in a rulemaking proceeding. In the context of several ETC designation orders, the Commission has noted that the Federal-State Joint Board is reviewing the Commission’s rules concerning the USF, including the process for designating ETCs.¹⁵ The Commission has acknowledged that the outcome of that proceeding could

¹³ Comments of LULAC, at 3 (emphasis in original).

¹⁴ See id. at 4.

¹⁵ See Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, 19 FCC Rcd 6422, ¶¶ 3-4 (2004); Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, 17 FCC Rcd 9596, ¶¶ 3-4 (2004).

potentially impact the criteria used for continued eligibility to receive universal service support. Wisely, the Commission acted on those requests notwithstanding the pendency of a proceeding which could result in future rule changes. Rather, the Commission decided to impose a more stringent public interest analysis for ETC designations in rural areas pending further action by the Commission. However, the Commission continues to consider petitions for ETC designation and issue substantive orders regarding those petitions.¹⁶ Accordingly, it is appropriate for the Commission to consider TracFone's ETC petitions, as amended to seek only low income support as well as its petition for forbearance.

TDS Telecom asserts that allowing ETCs to provide Lifeline services, but not also requiring them to seek support from the high cost program, would place an additional burden on the USF and would be administratively complex. TDS Telecom suggests that the Commission refrain from granting wireless carriers' ETC petitions until it adopts measures to control the size of the USF.¹⁷ As detailed above, the Commission continues to review and determine ETC petitions, including petitions filed by wireless carriers, even though rules governing such petitions are currently being considered for revision. Similarly, the fact that the Commission could adopt measures to control the size of the USF does not justify the Commission to cease consideration of ETC Petitions. In addition, the possibility that an ETC seeking support only from the low income program would pose additional administrative burdens on the USF does not warrant a conclusion that no other carriers may be designated as ETCs. Moreover, TDS Telecom's concern with the size of the USF if ETCs only sought support from the Lifeline is

¹⁶ See id.; see also ALLTEL Communications, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the state of Florida, et al., DA 04-3046 (released Sept. 24, 2004).

¹⁷ See Comments of TDS Telecom, at 5-8.

unfounded. The impact on the USF by carriers only seeking low income support is relatively less than the impact caused by carriers who seek both low income and high cost support.¹⁸

Several commenters contend that TracFone, as a pure reseller, should not be allowed to have ETC status.¹⁹ Whether TracFone should be permitted to be designated as an ETC given that it does not provide facilities-based services is the subject of TracFone's Petition for Forbearance, filed on June 8, 2004. Verizon and USTA contend that resellers with ETC status will receive a double recovery of universal service support: support incorporated into the wholesale price of resold services and direct support resellers would receive as a result of their status as an ETC. This issue is outside the scope of this proceeding. Nevertheless, as TracFone explained in its Petition for Forbearance, Verizon's and USTA's analysis does not apply to the resale of CMRS service because underlying CMRS carriers, unlike incumbent local exchange carriers, are under no obligation to provide their services to resellers at wholesale rates or to pass through universal service support to resellers.²⁰ TracFone addressed each component of the standard for forbearance codified at Section 10(c) of the Communications Act, and will not reiterate its demonstration of compliance with Section 10(c) in these reply comments.²¹ However, it is clear that TracFone meets each of the forbearance criteria codified at Section 10 of the Act.

¹⁸ TDS Telecom and Verizon's objections that TracFone's Lifeline proposal would increase the size of the USF are misplaced. As explained in its amended petitions, TracFone has limited its ETC proposal to Lifeline support in an effort to ameliorate the impact on the fund. TracFone shares those carriers' concerns about avoiding unrestrained growth of the USF.

¹⁹ See Comments of RIITA, at 2; Comments of USTA ("USTA"), at 4-6; Comments of Verizon, at 4-6;

²⁰ See TracFone's Petition for Forbearance, CC Docket 96-45, filed June 8, 2004, at 9-10.

²¹ 47 U.S.C. § 160(c); see TracFone's Petition for Forbearance, at 5-10.

Finally, TracFone agrees with several commenters who support the designation of wireless providers and resellers as ETCs and commend the benefits of prepaid services.²² As stated by NCAI:

Lifeline was created to ensure that all Americans would have access to telecommunications services. To fully achieve that goal in the twenty-first century, low-income people should have access to competitive wireless services of all kinds, including the prepaid wireless services described in the Tracfone petition. Prepaid services in particular hold promise for low income people because there are no long term contracts that may be difficult to honor, no additional charges for late payment and very often, as set out in the Tracfone petition, provide additional services like voice mail and long distance at no additional charge.”²³

TracFone also concurs with the view of commenters that the public interest will be served by an expansion of the range of service providers who are eligible to receive Lifeline support to include wireless resellers such as TracFone. Increased competition for consumers eligible to receive Lifeline services will spur carriers to provide diverse service offerings and better service and to ensure that qualified consumers are aware of their services.²⁴ Thus, increasing the universe of carriers who provide Lifeline services “will bring the same choices and consumer benefits to low-income people that are available to all other Americans, and would play an essential role in lowering costs to low income consumers and increase participation of eligible Americans in the Lifeline Program.”²⁵

²² See Comments of AFB; Comments of American Association of People with Disabilities and Self Help for the Hard of Hearing (“AAPD/SHHH”); Comments of LULAC; Comments of National Congress of American Indians (“NCAI”); and Comments of Telecommunications for the Deaf, Inc. (“TDI”).

²³ Comments of NCAI, at 3-4; see Comments of TDI, at 4; Comments of AAPD/SHHH, at 4.

²⁴ See Comments of LULAC, at 5; Comments of NCAI, at 4.

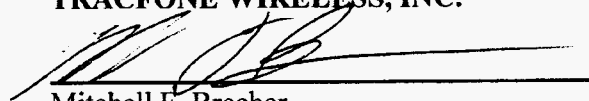
²⁵ Comments of NCAI, at 4.

CONCLUSION

For the reasons stated in these reply comments, TracFone's ETC petitions, as amended, do not request the Commission to revise its rules concerning ETC certification. TracFone's decision to limit the scope of its ETC petitions is consistent with the laws and regulations applicable to universal service and would serve the public interest. Accordingly, the rule changes sought by AT&T are not necessary in order for the Commission to grant and appropriately condition TracFone's petitions for ETC designation so that it can offer Lifeline service to qualified low income consumers.

Respectfully submitted,

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October 4, 2004

CERTIFICATE OF SERVICE

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